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BEFORE THE ARIZONA CORPORATION

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IN THE MATTER OF THE PETITION BY
AUTOTEL FOR ARBITRATION OF AN
INTERCONNECTION AGREEMENT WITH
QWEST PURSUANT TO SECTION 252(B)
OF THE TELECOMMUNICATIONS ACT

Docket No. T-01051B-05-0858

**RESPONSE BRIEF OF QWEST
CORPORATION**

Qwest Corporation ("Qwest"), pursuant to the Procedural Order issued in this docket on December 16, 2005, files this Response Brief to the "Opening Brief in Response to Qwest's Motion to Dismiss" filed by Autotel ("Autotel's Brief") and "Staff's Brief in Response to Autotel's Petition for Arbitration and Qwest's Motion to Dismiss" filed by Staff ("Staff's Brief").

INTRODUCTION

This docket was initiated when Autotel filed a "Petition for Arbitration" ("Petition") with the Commission on November 23, 2005. Administrative Law Judge Amy Bjelland, as Arbitrator, issued a Procedural Order on December 2, 2005, setting a Procedural Conference on December 15, 2005. Qwest filed "Qwest's Response to Petition for Arbitration, Including Motion to Dismiss" ("Qwest's Motion") on December 13, 2005. Following the Procedural Conference on December 15, 2005, Judge Bjelland issued a further Procedural Order directing the parties to file opening briefs on or before January 6, 2006, and response briefs on or before January 27, 2006, on the issue of

1 whether Autotel is precluded from filing the arbitration petition as urged by Qwest's
2 Motion. Opening Briefs were filed by Autotel, the Staff of the Commission and Qwest on
3 January 6, 2006.

4 Autotel's Brief fails to meaningfully address the authorities cited in Qwest's
5 Motion and Brief. Instead, Autotel makes brief, conclusory statements unsupported by
6 analysis or authority. It concludes by inviting the Commission to do nothing so that
7 Autotel can pursue remedies in another forum. On the other hand, Staff's Brief, which
8 does rely upon authorities and which contains analysis of the issues presented, reaches the
9 same conclusion as Qwest's Motion and Brief—that Autotel's Petition should be
10 dismissed. Qwest agrees with Staff's Brief.

11 Qwest and Staff have demonstrated that Autotel is abusing the process
12 contemplated by the Telecommunications Act of 1996 ("Act")¹ in seeking to arbitrate a
13 new agreement while its appeal of the Commission's Decision No. 67408 issued
14 November 2, 2004 in Docket No. T-01051B-04-0152 ("*Arbitration Decision*") is still
15 pending and where it has not even begun to operate under the agreement that resulted
16 from that decision. Four other states have already dismissed similar petitions for
17 arbitration filed by Autotel and its affiliate Western Radio Services Co. ("Western")² This
18 Response Brief will demonstrate that Autotel has offered no reason for the Commission to
19 reach a different result here.

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26 ¹ P.L. 104-104, 110 Stat. 56 (1996). In this Response Brief, sections of the Act will be
referred to by their section numbers as codified in Title 47 of the United States Code.

27 ² See Request of Qwest Corporation for the Commission to Take Official Notice of
28 Decisions in Other States filed January 17, 2006 in this docket.

ARGUMENT

I. Autotel Is Not Permitted to Ignore the *Arbitration Decision* and Its Own Appeal of that Decision and Commence a New Arbitration Proceeding

Autotel's Brief argues that Qwest's Motion should not be granted because Autotel was entitled to request negotiation of a new interconnection agreement and petition for arbitration. In support of this argument, Autotel mentions two things. First, it quotes one sentence from the term provision in the interconnection agreement approved by the Commission following the *Arbitration Decision*. Second, it refers to what it characterizes as a request for interconnection negotiations from Qwest to Autotel. Neither justifies a second arbitration proceeding while an appeal of the first proceeding is pending and before Autotel has even attempted to interconnect with Qwest under the approved agreement.

Qwest already analyzed the agreement's term language in its Opening Brief, citing authorities for the proposition that the language must be interpreted reading the contract as a whole and in a way that makes the agreement effective and that Autotel may not argue for an interpretation of the agreement that effectively repudiates the agreement.³ Autotel's simple reference to the language of the provision without analysis or authority does not undercut this argument in any way.

Autotel's attempt to mischaracterize the form letter Qwest sent to Western and other wireless carriers with whom it was exchanging traffic in response to a decision of the Federal Communications Commission ("FCC") as a request for negotiation of a new interconnection agreement with Autotel has already been addressed by the Oregon Commission.⁴ As found by the Oregon Commission, Qwest's form letter did not amount

³ See Qwest's Opening Brief at 15-17.

⁴ Autotel provides no context for this assertion. Autotel is apparently referring to Qwest's letter sent May 5, 2005 to Western in which it stated that it was withdrawing a section of its

1 to a request for negotiation of a new interconnection agreement even with respect to
2 Western, let alone with respect to Autotel.⁵ In addition, Autotel's own conduct here belies
3 this argument. If Autotel really believed that the letter sent by Qwest to Western in May
4 of 2005 constituted a request for negotiation with Autotel in Arizona, why did it cite its
5 own request for negotiation received by Qwest on June 23, 2005 as the basis for its
6 Petition?⁶ Indeed, if the request for negotiation occurred in May, as now argued by
7 Autotel, Autotel's Petition was filed outside the 135 to 160 day window of section
8 252(b)(1), and the Petition would have to be dismissed on that ground.⁷

9
10 Oregon Tariff providing facilities for radio common carriers, and thus that Qwest was
11 implementing an interim interconnection agreement until a permanent agreement could be
12 reached. Qwest's withdrawal of this tariff was the result of the FCC's decision in *T-Mobile*, 2005
13 WL 433200 (F.C.C.), 20 F.C.C.R. 4855, 20 FCC Rcd. 4855, 35 Communications Reg. (P&F) 291
14 (FCC 05-49, rel. Feb. 24, 2005). In that order, the FCC ruled that ILECs may not use tariffs to
15 impose on wireless providers termination charges on non-access traffic, and that although tariffs
16 may be invalid, the interim compensation process described in 47 C.F.R. § 51.715 would apply
17 until formal agreements between ILECs and wireless providers are established. Coupled with
18 *TSR Wireless*, 2000WL 796763 (F.C.C.), 15 F.C.C.R. 11,166, 15 FCC Rcd. 11,166, 21
19 Communications Reg. (P&F) 49 (FCC 00-194, rel. Jun. 21, 2000), regarding paging carriers,
20 Qwest decided that its only viable option was to withdraw this section of the tariff and to enter
21 into interconnection agreements with these types of wireless providers. Although Qwest sent this
22 form letter to Western (and approximately 180 other wireless providers in 11 states in which
23 Qwest is an incumbent with which Qwest was interconnected), it was not Qwest's intent to open
24 new negotiations for an interconnection agreement between Qwest and Western in Oregon.
25 Qwest did not even send the letter to Autotel because Autotel was not then (and is not now)
26 interconnected with Qwest in Arizona or any other state.

27 ⁵ See Order No. 1075, *In the Matter of Western Radio Services Co. Petition for*
28 *Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b)*
of the Telecommunications Act of 1996, ARB 537 (Or. PUC Oct. 10, 2005) at 4 ("The May 10
letter, cited by Western as a basis for rejecting Qwest's request to approve its proffered
interconnection agreement, in no way constituted a "request for negotiation."),
<http://apps.puc.state.or.us/orders/2005ords/05-1075.pdf>.

⁶ See Petition at ¶ 2.

⁷ 47 USC § 252(b)(1) ("During the period from the 135th to the 160th day (inclusive) after
the date on which an incumbent local exchange carrier receives a request for negotiation under
this section, the carrier or any other party to the negotiation may petition a State commission to
arbitrate any open issues."). Under the plain language of that statute, arbitration cannot relate
back to a request for negotiation made more than 160 days before arbitration is requested. *See,*
e.g., In re BellSouth Telecommunications, Docket No. 001305-TI, 2001 WL 686489, *4 (Fla.
P.S.C. May 23, 2001) ("Our jurisdiction to hear an arbitration vests after the parties have

1 Autotel's brief does not address the other arguments in Qwest's Brief regarding the
2 fact that the Petition is an improper attempt to nullify the *Arbitration Decision*, that it is
3 inconsistent with the Act and that the Commission lacks jurisdiction to reconsider the
4 *Arbitration Decision* while Autotel's appeal of that decision is pending. Therefore, these
5 well-supported arguments stand unrebutted.

6 For all of the foregoing reasons, Autotel's Petition is improper and should be
7 dismissed.

8
9 **II. Autotel's Argument on Compliance with Section 252(b)(2)(A) Is Irrelevant**
10 **Under the Procedural Order**

11
12 Autotel's Brief argues that it has complied with section 252(b)(2)(A) because
13 Qwest refused to negotiate an agreement and identify open issues. Autotel goes on to
14 argue that the issue in the arbitration is simply one of a difference in law and regulation
15 which it has identified. While the argument has obvious problems, as demonstrated in
16 Qwest's Motion, the Procedural Order did not contemplate that the parties would address
17 this issue at all. Therefore, Autotel's argument is irrelevant and should be ignored.

18 If the Commission nonetheless wishes to consider this argument, Qwest has
19 provided a thorough analysis of the deficiencies of the Petition in its Motion.⁸
20 Furthermore, Autotel's argument ignores the fact that the parties have a currently effective
21 agreement approved by the Commission that has no relationship to Autotel's proposed
22 agreement. Accordingly, even if it were otherwise appropriate for Autotel to seek
23 arbitration, Autotel would be obligated to identify each and every difference between the

24
25 followed the requirements of the Act calling for the filing of a petition 135-160 days after the
26 reception of a request for negotiation. Therefore, we have subject matter jurisdiction over
27 arbitrations brought before us in this manner."); *In re Sprint Communications*, 1997 WL 178839,
*1 (Ind. U.R.C. Jan. 09, 1997) (petition was timely filed within 160 days, "Accordingly, this
Commission has jurisdiction both over the parties and the subject matter of this proceeding.").

28 ⁸ See Qwest's Motion at 13-15.

1 agreement it is proposing and the approved agreement upon which Qwest is relying as an
2 open and disputed issue. Given that the issues decided in the *Arbitration Decision* are
3 clearly differences between the two agreements, Autotel could have easily identified at
4 least those issues as open issues and provided the parties' positions on them. Autotel's
5 characterization of hundreds of differences in language as merely two different
6 interpretations of law and regulation is a gross and inaccurate over simplification which
7 does not provide any assistance to the Commission in arbitrating open issues. Autotel has
8 clearly failed to comply with section 252(b)(2)(A) and A.A.C. R14-2-1505.B.2, and it
9 Petition should be dismissed.

11 **III. Autotel's Conclusion Reveals Its True Intent—to Cure Defects in Its Appeal** 12 **or to Seek a Different Forum**

14 After cavalierly withdrawing Issues 2 and 3 from its Petition,⁹ Autotel concludes
15 that the Commission need not act on its Petition and then suggests that “[g]iven the
16 situation, it would be better to do nothing than to take action.”¹⁰ If Autotel does not want
17 the Commission to take action, why did it file the Petition asking the Commission to
18 approve an interconnection agreement? Apparently, the filing was just part of some
19 misguided litigation strategy by Autotel to try to cure defects in its appeal or to allow it to
20 bring the matter before the FCC. Either way, the Commission should not tolerate such
21 disingenuous and wasteful action on the part of Autotel.¹¹

23 ⁹ Autotel's Brief at 2.

24 ¹⁰ *Id.* at 3.

25 ¹¹ As noted in Qwest's Motion, note 1, Autotel's actions in this matter strongly suggest
26 that sanctions against Autotel would be warranted. Autotel has already imposed a waste of
27 resources on the Commission and the parties by filing the Petition. Now, in its Brief, Autotel
28 essentially admits that the Petition was simply a waste of time in telling the Commission that two
of the three issues in its Petition should be withdrawn and that the other issue—a request for
approval of an interconnection agreement—should be ignored.

1 **CONCLUSION**

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3 The Staff and four other state commission's agree with Qwest that Autotel's

4 Petition should be dismissed. For the reasons set forth in Qwest's Motion and Brief,

5 Staff's Brief and this Response Brief, Qwest respectfully submits that the Commission

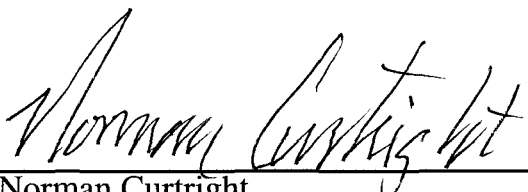
6 should dismiss the Petition.

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8 DATED this 27th day of January, 2006.

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